

OFFICIAL FILE
ILLINOIS COMMERCE COMMISSION

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ORIGINAL

ILLINOIS
COMMERCE COMMISSION

Mar 28 10 11 AM '01

Illinois Commerce Commission

On Its Own Motion

vs

Pre-Paid Local Access Phone
Service Co.

Citation to determine current fitness
to offer telecommunications services
under Sections 13-404 and 13-405 of
the Public Utilities Act

CHIEF CLERK'S OFFICE

ICC Docket No. 00-0073

STAFF OF THE ILLINOIS COMMERCE COMMISSION'S
REPLY TO PRE-PAID LOCAL ACCESS PHONE SERVICE, INC.'S
RESPONSE TO MOTION FOR SUMMARY JUDGMENT

The Staff of the Illinois Commerce Commission (hereafter, the "Staff") states, in reply to Pre-Paid Local Access Phone Service, Inc.'s (hereafter, "Pre-Paid" or "Respondent") Response to the Commission's Motion for Summary Judgment, as follows:

I.

SUMMARY OF PRE-PAID'S RESPONSE

1. On April 26, 2000, the Staff filed its Motion for Summary Judgment in the above-captioned matter. *See, generally, Motion for Summary Judgment.* The Staff asserted in that Motion that, as a matter of law, Respondent no longer possessed sufficient financial, managerial, and technical resources and abilities to continue to maintain its Certificate of Service Authority, or to continue to provide telecommunications service to customers in the State of Illinois. *Id.* The Staff's Motion was supported by various documents provided to the Staff by Pre-Paid in response to data requests, and by authenticated documents obtained from the files of the Circuit

Court of Cook County, and the U.S. Bankruptcy Court for the Northern District of Illinois.
Id.

2. On March 20, 2001, after numerous extensions and delays, Pre-Paid filed a document styled its "Response to the Commission's [sic] Motion for Summary Judgment," along with several attachments. *See, generally, Response.*

3. Pre-Paid asserted in its Response that "[i]t is acknowledge [sic] that this Honorable Commission has the statutory duty to maintain that all the holders of a Certificate must continue its [sic] ability to provide such a service which is their duty. The Commission also has the obligation to oversee said holders and to advise and counsel them if they have failed to comply with the Commission's Ruler [sic] and Regulations." Response, ¶1. The Respondent fails to refer the Commission to any statute which requires the Commission or Staff to undertake this "statutory duty." Id.

4. The Respondent further notes that the Attorney General sued Respondent and its President, Jody Williams, "alleging lack of services under the Consumer Fraud and Reception [sic] Business Practice [sic] Act." Response, ¶ 2. The Response then states, quite incorrectly, that "a settlement agreement was entered into between the parties." Id. Respondent appears to attach some significance its assertion that it "was not represented by counsel" in that proceeding. Id. It further contends that the Attorney General's action was "beyond the scope of its authority, as the only regulatory body that has jurisdiction over this Respondent is this Honorable Commission." Id. Respondent cites Nowakowaski [sic] v. American Red Ball Transit Co., 288 Ill. App. 3d 348 (2nd Dist. 1997) as authority for this proposition. Id.

5. The Respondent further contends that it was required to present evidence to the Commission that it "still had maintained its necessary financial and managerial resources and ability, to offer the services authorized to the general public[.]" and that "the [S]taff submitted [sic] a list of questions the Respondent was to Answer [sic]." Response, ¶ 3. Although Respondent asserts that it submitted such answers, "the Examiner is now asked to find that the Respondent did not adequately answer [the Staff's data requests] and that it [sic] Certificate should be revoked." Id.

6. Respondent next asserts, as is undoubtedly the case, that the "Commission has its own Rules of Procedure [sic] and is not a Trial Court." Response, ¶ 4. Respondent then gives as its position that "not only does the holder of authority have a duty to conduct [sic] its business in accordance with the Commission's stated goal and requirements, it is also the Commission's requirement [sic] to advise [sic] and assist the existing [sic] holders to maintain [sic] its [sic] operations for the benefit [sic] of the general public." Id. Respondent then submits that "the Commission and its [S]taff, should allow respondent to maintain its Certificate [sic], and, upon restrictions and guidance [sic] to conduct its service for the general public." Id.

7. Respondent contends that its financial problems resulted from its resale agreement with Ameritech. Response, ¶ 5. It asserts that its resale agreement "was not financially positive for [it]," and "resulted a [sic] negative income for [it]." Id. Respondent observes that "Ameritech put [it] in a hole[.]" but, magnanimously, it "is willing to arrange with Ameritech a plan that would deduct the amount due to Ameritech but not burden the operation of Respondent." Id. Respondent claims to have "filled [sic] arrangements with GTE [] North and South [] as additional sources of customers and

will show a profit.” Id. It further states that it “entered into a financial agreement with the SBA, TCF Bank, and Pullman Bank. Additional sources of revenue is [sic] now being obtained by Merrill Lynch.” Id.

8. Finally, Respondent asserts that it has “brought in a new [management] team[,]” Response, ¶ 6, and formulated a new business plan. Response, ¶ 7.

9. Accordingly, Respondent contends that “there is a question of fact [in this proceeding] and ... a hearing is required to develop [sic] same.” Response, Prayer for Relief. It requests that the Staff’s Motion be denied, or, alternatively, that “it [presumably, Staff’s Motion, or a ruling thereon] would be held for a time period to operate in accordance with the Commission approval and to rectify its prior problems. The Commission could, with a mandate, oversee the Respondent’s operations with guidance [sic] and to continue business for the benefit of all parties.” Id.

II. ARGUMENT

STAFF’S MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED

10. In its Response, Pre-Paid attempts to make four basic assertions, *albeit* in a rather obscure way. First, it contends that the Commission and the Staff have a duty to give advice and counsel to holders of Certificates of Authority, to enable such holders to remain in business and to maintain certification. It contends that the Commission and Staff have not taken appropriate steps to fulfil this duty. Second, it asserts that its financial problems, the existence of which it does not attempt to deny, are attributable to (a) Ameritech; and, (b) presumably to a lesser extent, the Commission, for permitting Respondent to enter into a resale agreement with Ameritech upon what the

Respondent alleges to have been unfavorable terms. Third, it contends that the Attorney General's action against it in the Circuit Court of Cook County was somehow improper and *ultra vires*. Finally, it contends that it has implemented a new business plan, obtained funding, and retained new management. Regrettably, none of these assertions are borne out by Respondent's pleading. Accordingly, summary judgement should be granted.

11. First, the Commission and the Staff have no duty, either individually or collectively, to advise and counsel holders of Certificates of Service Authority regarding how to remain in business. While Respondent asserts that the alleged duty of the Commission and Staff to ensure the success, or at least help prevent the failure, of telecommunications providers, is "statutory," Respondent refers to no statute or statutes in support of this assertion. This is, of course, because no such statute exists. See, *generally*, 220 ILCS 5/1-101 *et seq.*

12. Second, the Respondent makes no attempt to deny the Staff's assertion, raised and amply supported in its Motion for Summary Judgment, that Respondent has defaulted on its resale agreement with Ameritech. See Motion for Summary Judgment, ¶¶ 10, 13-20. In other words, Respondent does not deny that it owes something on the order of \$400,000 to Ameritech (by its own admission, see Motion for Summary Judgment, ¶ 20) which it appears willing to repay only to the extent that such repayment does not "burden [its] operation[.]" Response, ¶ 5. Respondent does not suggest that it has, or ever will have, the ability to repay this sum, which it presumably will have to do if it wants to engage in business in the Ameritech service territory. Respondent does not contend that it did not contract for and use the service which gave rise to this debt.

Respondent does not indicate what unfair or unreasonable practice Ameritech engaged in which interfered with its operation. In short, Respondent does not (1) contest the existence of the debt; (2) assert that the debt was paid, discharged or otherwise satisfied; (3) assert that Ameritech somehow breached its contract with Respondent, or otherwise engaged in unscrupulous or anti-competitive practices to Respondent's detriment; or (4) assert that it has contested the debt in any legally cognizable way. Moreover, it states that it will only repay this debt if repayment is not burdensome. This indicates that Respondent lacks financial and managerial resources and abilities.

13. Third, Respondent contends that the Attorney General had no authority to bring, and the Circuit Court had no authority to adjudicate, the action brought against it under the Consumer Fraud and Deceptive Businesses Practices Act. In support of this proposition, it cites Nowakowski v. American Red Ball Transit Co., 288 Ill. App. 3d 348 (2nd Dist. 1997)¹. In fact, Nowakowski stands for no such proposition and is irrelevant to this proceeding. Nowakowski merely holds that the federal Carmack amendment, which preempts state law claims against interstate motor carriers, preempted a private state Consumer Fraud Act claim against a motor carrier. Nowakowski, 288 Ill. App. 3d at 353. It did not address, nor are its facts analogous to, the issue of whether the Attorney General can maintain a Consumer Fraud Act claim against a telecommunications carrier.

14. In addition, to the extent that the Respondent believed that the Attorney General could not maintain a Consumer Fraud Act claim, the proper forum to make such an assertion is in the Circuit Court action, by way of a motion to dismiss for want of jurisdiction, rather than before the Commission. However, the Respondent appears

not to have pursued such a course; rather, it has allowed itself to be reduced to judgment by default in the Attorney General's action. See Final Judgment Order, People of the State of Illinois v. Pre-Paid Local Access Phone Service Co., Inc. and Jodi D. Williams, 99 CH 17017 (Cook County Circuit Court) (February 6, 2001) (hereafter "Final Judgment Order"), a certified copy of which is attached hereto as Exhibit No. 1, and incorporated by this reference herein. This, in and of itself, evidences that Respondent lacks managerial abilities and resources.

15. The Final Judgment Order recites, in summary, the following findings of fact, of which the Staff requests that administrative notice be taken: (1) Defendants Pre-Paid and Jodi Williams took money from customers to render phone service, but did not, in fact, render such service; (2) Defendants Pre-Paid and Jodi Williams purchased telecommunications time and services from Ameritech; (3) Ameritech discontinued providing such time and services to Defendants Pre-Paid and Jodi Williams because of non-payment; (4) Defendants Pre-Paid and Jodi Williams continued to advertise and sell services after Ameritech ceased providing services to defendants; and (5) Defendants Pre-Paid and Jodi Williams violated the Consumer Fraud and Deceptive Business Practices Act, and the Uniform Deceptive Trade Practices Act. Final Judgment Order, ¶¶ 3-12. The Circuit Court specifically found that it had jurisdiction over the parties and the cause of action. Final Judgment Order, ¶ 13.

16. In addition to these findings, the Circuit Court specifically, and permanently, enjoined Defendants Pre-Paid and Jodi Williams from advertising or providing resold basic dialtone service. Final Judgment Order, ¶ 14. The Circuit Court

¹ This is the only citation to any form of authority in Pre-Paid's Response.

entered a civil penalty of \$25,000 against Pre-Paid and Jodi Williams, and ordered them to make restitution to defrauded customers. Final Judgment Order, ¶ 15.

17. Respondent cannot claim, despite attempting to do so, that the Final Judgment Order is somehow mitigated by the fact that Respondent was unrepresented by counsel in the proceeding. Respondent is – or in any case, was at the time – a business corporation, and, accordingly, cannot appear in court except through counsel. 705 ILCS 220/1; see *also*, Greer v. Ludwick, 100 Ill. App.2d 27, 39; 241 N.E.2d 4 (5th Dist 1968). This, again demonstrates the Respondent's profoundly defective level of managerial abilities and resources.

18. Moreover, Respondent made a materially false representation to the Commission in its Response, where it asserted that "a settlement agreement was entered into between the parties [to the Attorney General's action]." Response, ¶ 2. As has been seen, Respondent was in fact adjudged liable by default, found to have committed unfair or deceptive acts or practices within the meaning of the Consumer Fraud Act, permanently enjoined from providing phone service to residential customers, and ordered to pay a substantial civil penalty and restitution. This could not, in good faith, possibly be characterized as a settlement.

19. In consequence of the Final Judgment Order, Respondent is prohibited by the Final Judgment Order from offering the service it wishes to offer; to the extent it continues to do so, it violates a permanent injunction. Accordingly, there is scarcely any need to consider the Respondent's assertions that it has altered its business plan, changed its management, and obtained financing. For this reason alone, the Commission is entitled, and should, revoke Respondent's certification.

20. However, to the extent that the Commission considers the Respondent's business plan, management, and financing plans to be worth considering, these are defective as well. The Respondent proposes to prove the existence of its newly invigorated management by producing unverified letters from two persons purporting to be consultants. See Attachments to Response. It attempts to prove that it has obtained financing by making unsupported assertions to that effect, and by producing of an unverified letter from the Pullman Bank which indicates that Respondent has "made a formal written application for a working capital loan[.]" which the Pullman Bank was, as of March 20, 2001, in the process of considering, but had certainly not by any means funded. See Late-Filed Attachment to Response. The Respondent produced no evidence whatever, save its naked assertion, regarding the other alleged funding. This, of course, begs the question of why a small company that owes something on the order of \$425,000 to various creditors is assuming additional debt and why this should be deemed to be evidence of financial resources and abilities.

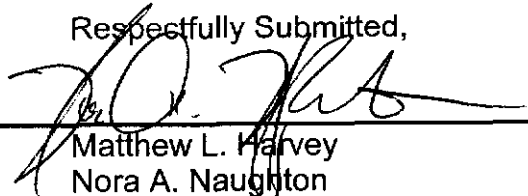
21. There remains, of course, the intriguing matter of the Respondent's actual existence as a corporation. Respondent appears now to be holding itself out as Unlimited Prepaid, Inc., d/b/a Prepaid Local Access Phone Service, Inc. See, *generally*, Attachments to Response. Pre-Paid Local Access Phone Service, Inc., however, was involuntarily dissolved by the Secretary of State on March 1, 2001. See Exhibit No. 2. Moreover, there is no record of any Illinois corporation using the corporate or assumed name Unlimited Prepaid, Inc., or any evidence of an assumption of such a business name under the Assumed Business Names Act. Since Respondent no longer maintains a corporate existence and, furthermore, since its Certificate of Service

Authority is issued in the corporate name of Respondent, an entity that no longer exists, its Certificate should be summarily revoked.

22. In summary, Pre-Paid has not, in its Response, raised any affirmative matters which contravene the facts the Staff demonstrated in its Motion for Summary Judgment, or which otherwise give rise to issues of material fact, even though it had nearly a year to discover and raise such matters. There are no material facts at issue in the proceeding. The Respondent clearly ignores its debts, allows itself to be reduced to judgment and enjoined from providing local telephone service to residential customers, and has adopted the legal position that the Commission, the Staff, and Ameritech have a duty to keep it from failing in its business operations, but its own management does not. It has been dissolved by the Secretary of State, and cannot manage to successfully declare bankruptcy. In short, Respondent possesses *nothing remotely approaching* sufficient financial, managerial, and technical resources and abilities to warrant retention of its Certificate of Service Authority. Accordingly, the Staff's Motion for Summary Judgment should be granted.

WHEREFORE , the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

Respectfully Submitted,



Matthew L. Harvey

Nora A. Naughton

Illinois Commerce Commission

Office of General Counsel

160 North LaSalle Street

Suite C-800

Chicago, Illinois 60601

312 / 793-3243

March 27, 2001

Counsel for the Staff of the
Illinois Commerce Commission

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce commission
On Its Own Motion

00-0073

-vs-

Pre-Paid Local Access Service Co.

Citation to determine current fitness
to offer telecommunications services
under Sections 13-404 and 13-405 of
the Public Utilities Act.

NOTICE OF FILING

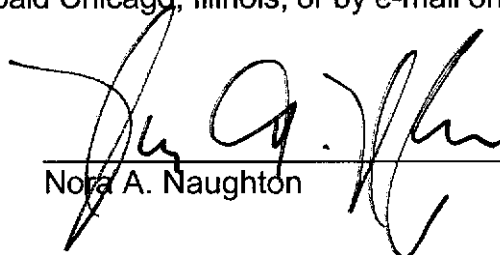
YOU ARE HEREBY NOTIFIED that I have, on this 27th day of March, 2001,
forwarded to the Chief Clerk of the Illinois Commerce Commission, for filing in the above-
captioned docket, the Staff of the Illinois Commerce Commission's Reply to Pre-Paid
Local Access Phone Service Inc.'s Motion for Summary Judgement, copies of which are
hereby served upon you.



Nora A. Naughton
Matthew L. Harvey
Illinois Commerce Commission
Office of General Counsel
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
(312) 793-2877

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Notice, together with the
documents referred to therein, were served upon the parties on the attached Service List,
by first-class mail, proper postage prepaid Chicago, Illinois, or by e-mail on this 27th day of
March, 2001.



Nora A. Naughton

SERVICE LIST

Docket # 00--0073

3-27-01.....MLH

**Erin O'Connell-Diaz
Hearing Examiner
Illinois Commerce Commission
160 N. LaSalle Street, C-800
Chicago, IL 60601**

**Patrick Phipps
Illinois Commerce Commission
527 E. Capitol Avenue
Springfield, IL 62706**

**Cindy Jackson
Illinois Commerce Commission
527 E. Capitol Avenue
Springfield, IL 62706**

**Patrick H. Smyth
Patrick H. Smyth & Associates
105 W. Madison Street, Suite 2300
Chicago, IL 60602**

**Jennifer S. Moore
Illinois Commerce Commission
160 N. LaSalle, Suite C-800
Chicago, IL 60601**

**Nora A. Naughton
Matthew L. Harvey
Illinois Commerce Commission
160 N. LaSalle, Suite C-800
Chicago, IL 60601**

**Joseph E. Donovan, Henry T. Kelley
O'Keefe, Ashenden, Lyons & Ward
30 N. LaSalle Street, Suite 4100
Chicago, IL 60602**

**Jodi Williams
Pre-Paid Local Access
510 W. Taft Drive
South Holland, IL 60473**

**Donna Caton
Chief Clerk
Illinois Commerce Commission
527 E. Capitol Avenue
Springfield, IL 62706**

**Danny Meyers
P.O. Box 1478
Elgin, IL 60121**